

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

MARTEZ TIMMONS,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 240000
Wayne Circuit Court
LC No. 01-007463

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals by right his convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with assault with intent to commit murder, MCL 750.83, assault with intent to rob while armed, and felony-firearm in connection with the shooting of complainant. Complainant testified that his wife drove him to Detroit to purchase marijuana. A man complainant identified as defendant approached his vehicle on a bicycle. After complainant asked if marijuana were available for purchase, defendant directed complainant's wife to drive around the block and told complainant to accompany him to a location behind a nearby house. Complainant stated that when he and defendant arrived at the back of the house, defendant told him that he had crack cocaine for sale. Defendant then displayed a black handgun and demanded complainant's money. Complainant stated that he turned to run, and defendant shot him in the back. The bullet severed his spine and rendered him a quadriplegic. Complainant examined plaintiff's Exhibit 3, a photograph of defendant holding a gun, and stated that the gun in the photograph was similar to the gun defendant used on the day of the incident.¹

Complainant acknowledged that he had never seen defendant before the day of the incident. He viewed a photo array several months after the incident and selected defendant's

¹ At a later point in the proceedings the trial court ruled that this photograph and another photograph marked as plaintiff's Exhibit 2 were admissible.

photograph. Initially he “thought” that the man in the photograph was the perpetrator, but later stated he was positive that the man was the perpetrator. Complainant indicated that defendant’s head was shaved in the photograph, but that he remembered defendant’s face. Complainant remained adamant that defendant was the perpetrator.

Complainant’s wife testified that she drove complainant to Detroit to purchase marijuana. She stated that a person riding a silver mountain bike approached the vehicle and spoke to complainant. She drove to a location indicated by the person, and complainant accompanied the person behind a house. Shortly thereafter, complainant attempted to run from behind the house. The person who had accompanied complainant shot complainant in the back. Complainant’s wife viewed a lineup but failed to identify defendant as the perpetrator.

Detective Ruese testified that he canvassed the area and spoke to several persons who were in the vicinity when complainant first encountered defendant. Those persons identified defendant by the street name “Tank.” Defense counsel objected to Ruese’s testimony on the ground that it was hearsay. In response, the prosecution argued that the testimony was offered to show why the police went to a particular address in search of defendant. The trial court overruled the objection. Ruese stated that he and other officers went to a particular address and arrested defendant. The police seized photographs found on the dining room table, one showing defendant holding a handgun similar to the handgun the complainant described. Ruese stated that defendant waived his rights and made a statement. Defendant denied speaking to anyone in a van, denied that anyone approached him to purchase marijuana, and denied shooting anyone.

Defendant testified that on the date of the incident he rode his bicycle to an area to purchase marijuana. A man in a dark van asked him if anyone in the area sold crack cocaine. Defendant stated that he relayed the request to a person he identified as Frank, but that Frank said no one in the area sold narcotics. Defendant indicated that aside from him and the occupants of the van, the only persons in the area were, Frank, a person he identified by the street name “Muff,” and an unknown person on a bicycle. Defendant maintained that after he purchased marijuana, he left the area and did not hear any shots. He denied that he carried a weapon or that he shot complainant. Defendant viewed the photograph that depicted him holding a handgun, and stated that it was taken before the incident. He denied that he owned the firearm shown in the photograph. Defendant stated that on the day of the incident he rode a ten-speed bicycle, but acknowledged that a mountain bike was located at the residence where he lived. Defendant acknowledged that plaintiff’s Exhibit 3 depicted him holding a black handgun and that his nickname was “Tank.” Defendant identified plaintiff’s Exhibit 2 as a photograph of him holding two guns. A mountain bike appeared in the photograph.

The jury found defendant guilty of assault with intent to do great bodily harm less than murder as a lesser included offense of assault with intent to commit murder, assault with intent to rob while armed, and felony-firearm. The trial court sentenced defendant to concurrent terms of twenty-three months to ten years and 180 months to 270 months for the convictions of assault with intent to do great bodily harm less than murder and assault with intent to rob while armed, respectively. The court also sentenced defendant to a consecutive two-year term for the conviction of felony-firearm. Defendant received credit for sixty-five days served in jail.

Generally, all relevant evidence is admissible. Relevant evidence is evidence having any tendency to make the existence of any fact which is of consequence to the determination of the

action more probable or less probable than it would be without the evidence. MRE 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002).

Defendant argues that the trial court abused its discretion by admitting photographs that depicted him holding firearms and that featured a mountain bike in the background. We disagree. Plaintiff's Exhibit 3 depicted defendant holding a black handgun that was similar to the weapon complainant testified defendant carried and used to shoot him. Evidence that an accused possessed a weapon of the kind used in the charged offense is routinely determined to be direct, relevant evidence of the accused's commission of the offense. *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). Furthermore, evidence that defendant had access to a mountain bike like that described by complainant's wife as ridden by the person who shot complainant was relevant in that it made defendant's identity as the perpetrator more probable than it would have been without the evidence. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). The fact that the photographs were undated, aside from the approximate date defendant provided, went to the weight of the evidence rather than to its admissibility. Defendant has not established that the photographic evidence was more prejudicial than probative, and thus inadmissible under MRE 403. Unfair prejudice exists when either a probability exists that the evidence will be given undue weight, or it would be inequitable to allow its use. *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Presentation of the photographs took little time, and the evidence was directly probative of defendant's identity as the person who assaulted and shot complainant. The evidence corroborated the eyewitness testimony of complainant and his wife regarding defendant's use of a gun and a bicycle. No abuse of discretion occurred. *Id.*

Hearsay is an out-of-court statement offered to prove the truth of its assertion. Hearsay is inadmissible unless there is a specific exception allowing for its introduction. *People v Poole*, 444 Mich 151, 158-159; 506 NW2d 505 (1993); MRE 802. If a declarant is unavailable for cross-examination, the erroneous admission of hearsay against a criminal defendant is a constitutional error in that it violates the defendant's right of confrontation. US Const, Am VI; Const 1963, art 1, § 20; *People v Tanner*, 222 Mich App 626, 631-632; 564 NW2d 197 (1997).

Defendant argues that reversal is required because the trial court abused its discretion by allowing the prosecution to elicit testimony from Ruese that he spoke to various persons who identified the perpetrator by the street name "Tank." *People v Wilkins*, 408 Mich 69, 71-74; 288 NW2d 583 (1980). Even if we assume that admission of the hearsay evidence constituted error, we conclude that plaintiff has demonstrated that the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994). The witnesses to whom Ruese spoke did not state that defendant shot complainant. The evidence that defendant shot complainant came from the direct testimony of complainant and his wife. Any error resulting from the solicitation of hearsay testimony that defendant interacted with complainant when complainant first arrived in the area was harmless and does not require reversal. *Id.*; MCL 769.26.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial

misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant argues that the prosecutor engaged in misconduct that denied him a fair trial by repeatedly referring to complainant's paralysis and by improperly eliciting hearsay information from Ruese regarding the identity of the perpetrator. We disagree. Defendant did not object to the prosecutor's references to complainant's paralysis, so unless plain error occurred, he is not entitled to relief on this issue. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Appeals to the jury to sympathize with the victim constitute improper argument. *Watson*, *supra*, 591. Here, the prosecutor briefly mentioned the complainant's paralysis which was relevant because it was the injury complainant suffered from being shot. Moreover, the trial court instructed the jury that it was not to allow its decision to be influenced by sympathy or prejudice. Defendant has not demonstrated the existence of plain error entitling him to relief. *Carines*, *supra*. The admission of hearsay evidence constituted at most harmless error. *Anderson*, *supra*; MCL 769.26. Prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. *Noble*, *supra*. The prosecutor's solicitation of this evidence did not deprive defendant of a fair trial. *Watson*, *supra*, 586.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice, i.e., a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that counsel rendered ineffective assistance at trial by failing to request an instruction on the dangers of cross-racial misidentification, by failing to effectively and successfully argue that Ruese's testimony that area residents identified the perpetrator as "Tank" constituted inadmissible hearsay, and by failing to object when the prosecutor asked him his nickname. We disagree. No evidence showed that complainant spoke to anyone other than defendant. Complainant did not have the task of choosing the perpetrator from among a group of African-American men. Complainant positively identified defendant as the person who approached his vehicle and later shot him. Defendant denied that he assaulted or robbed complainant. The jury was entitled to find complainant's testimony credible. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Defendant has not demonstrated that had the jury been instructed on the dangers of cross-racial misidentification, it is reasonably probable that the result of the proceedings would have been different. *Carbin*, *supra*. Furthermore, the

fact that defense counsel's argument regarding the admissibility of Ruese's testimony that residents identified the perpetrator as "Tank" did not prevail does not mandate a conclusion that counsel rendered ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Finally, it is likely that counsel decided as a matter of trial strategy to refrain from objecting to the prosecutor's question regarding defendant's nickname in order to avoid calling further attention to the matter. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not overcome the presumption that counsel rendered effective assistance. *Rockey, supra*.

Finally, we reject defendant's argument that the cumulative errors deprived him of due process and a fair trial. At most, the introduction of inadmissible hearsay constituted harmless error. Defendant's remaining arguments are without merit. Cumulative error requiring reversal does not exist. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

We affirm.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad